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IN THE

Supreme Court of the United States

October Term, 1955

No. 393

GEORGE BERNSTEIN, et als,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May it Please This Honorable Court

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Appendix, Page 1a) is reported at 234 F. 2d 475.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1956. Petition for Rehearing was filed within the

time allowed by the court in its Order dated June 14, 1956, (R. 1321) which Petition was denied on August 7, 1956. The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C., 1254.

QUESTIONS PRESENTED FOR REVIEW

I

Where, by indictment and bill of particulars, petitioners were accused of attempted individual income tax evasion for failure to report certain "dividends", could petitioners be convicted where, under applicable laws, the Government failed to prove the existence (and petitioners were not allowed to show the non-existence) of any accumulated or current earnings or profits of the corporation out of which dividends could be paid?

II

Where petitioners' counsel had three times made known his desire to take exceptions to the trial court's instructions, was it not prejudicial error for the trial court, (1) not to afford counsel an opportunity to make such exceptions out of the hearing of the jury, and (2) not to permit counsel the right fully to state the basis of his objections, before the jury retired?

III

Where petitioners were charged with wilful tax evasion, was it not error for the trial court to charge that criminal intent might be presumed from their acts?

STATUTES INVOLVED IN QUESTION I.

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) General Definition. — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(e) Distribution by Corporations.—Distribution by corporations shall be taxable to the shareholders as provided in section 115.

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) Definition of Dividend. — The term "dividend" when used in this chapter * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or

profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. * * *

(b) Source of Distribution.—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

* * * * *

(d) Other Distributions from Capital.—If any distribution made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not a dividend, then the amount of such distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. * * *

(26 U.S.C. 1946 ed., Sec. 115).

SEC. 145. PENALTIES.

* * * * *

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 145.)

STATUTES INVOLVED IN QUESTION II.

Rule 30, Federal Rules of Criminal Procedure

Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omis-

sion therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(FEDERAL RULES OF CRIMINAL PROCEDURE, TITLE 18 U.S.C.)

STATEMENT

On January 27, 1954, George Bernstein, David Scherer, Ben Hammerman, Barney Hodes and Charles Gersch were indicted on 14 separate counts of income tax evasion and conspiracy. Petitioners Bernstein, Scherer, Hammerman and Hodes were each charged in three-count indictments (R. 1, 56, 117, 130) with wilfully having attempted to defeat and evade his individual income taxes for the years 1947, 1948, and 1949, inclusive. In addition, each of the foregoing petitioners was charged in a separate three-count indictment (R. 104) with having wilfully atempted to evade and defeat the income taxes of a certain Florida corporation, to wit: the Selray Corporation, for the fiscal years ending October 31, 1947, 1948, and 1949. Petitioner Gersch was charged in a separate indictment with aiding and abetting the other-named petitioners in an attempt to defeat and evade the income taxes of the Selray Corporation; and in addition, all of the petitioners (R. 73) were charged in another indictment with conspiracy to defeat and evade the income taxes of the said Selray Corporation for the fiscal years 1947, 1948, and 1949.

After jury trial, all petitioners were found guilty on

all counts. Petitioners were sentenced to concurrent terms of imprisonment on each count, and in addition varying fines were imposed on the individual counts (R. 30, 71, 83, 85, 86, 88, 90, 110, 112, 114, 115, 128, and 145).

In each of the four indictments for individual income tax evasion, the respondent had been ordered to furnish bills of particulars, which, in answer to a request to state whether or not each individual petitioner was charged by the respondent with having received unreported income, particularized as follows:

> * * * and that the amounts in the following schedule which were omitted from the returns filed by the defendant were actually received by the defendant: * * *
>
> | | 1947 | 1948 | 1949 |
> |---|---|---|---|
> | Dividends— | | | |
> | Selray Corp. | $15,086.67 | $8,440.45 | $4,346.21 |
>
> * * * (R. 13)

The evidence of unreported income upon which the petitioners were convicted may be summarized as follows: The Selray Corporation during the years involved was the operator of a hotel located in Miami Beach, Florida. The petitioners, with the exception of Gersch, were equal stockholders in such corporation. The books of the corporation were set up upon the accrual basis.

Government Agent Karo, one of the respondent's witnesses, testified that he had audited the records of the Selray Corporation for certain selected months within each of the fiscal years involved, and had found that the totals of certain "duplicate guest bills" of the hotel for those

months were in excess of the totals shown on the hotel books for the same months. This witness then asserted that this excess represented additional income to the corporation. He set up the total amount of what he considered additional income to the Selray Corporation for each of the calendar years 1947, 1948, and 1949, divided this total by four, and added the resulting amount to the reported net income of each of the individual petitioners for the years charged (R. 848-860); the witness assuming these amounts to be "dividends" as charged in the bill of particulars.

Petitioners' counsel immediately objected to the testimony on the ground that no earnings or profits, and hence no "dividends" had been shown. The trial court overruled this objection, holding that no earned surplus need be shown (R. 853-854) since dividends could be paid "legally or illegally". In this same connection, however, the trial court refused to admit into evidence a Government exhibit (No. 71 for Id.) purporting to show a computation of earned surplus (upon the respondent's theory of how it should be done) upon petitioners' objection that there had been no foundation laid for the matters contained in such exhibit (R. 850-857 Appendix page 26). On cross-examination by petitioners' counsel, this witness testified that he had "made a determination" of earned surplus, but the petitioners' counsel was not permitted to cross-examine this witness as to the basis of his computations (R. 898-900, 903-905).

In presenting their case, the petitioners attempted to show that there were *no* current or accumulated earnings or profits, out of which the dividends, charged to the individual petitioners by the bill of particulars, could be paid. Petitioners offered testimony showing the amount of addi-

tional taxes and profits of the Selray Corporation which had been proposed to the corporation's representative by members of the Internal Revenue Service. This testimony and a schedule summarizing it (Def. Ex. 1 for Id.) was excluded from evidence by the trial court on the grounds of materiality (R. 1069-1071). Subsequently, petitioners proffered witness Kantzler, a Certified Public Accountant. Based upon the trial court's advance indication that his testimony would not be admitted, his witness was qualified as an expert out of the presence of the jury. Continuing in the absence of the jury, petitioners proffered this witness' testimony that, contrary to that which had been testified to by the Government witness (R. 904), and contrary to the trial court's understanding (R. 918), actually there was no earned surplus from which taxable dividends might be paid. This testimony was incorporated into a schedule prepared by this witness (Def. Ex. 17 for Id.). Neither the testimony of this witness nor the exhibit was allowed into evidence (R. 1206), the trial court holding it immaterial. At the close of all the evidence, petitioners moved for judgment of acquittal in each of the individual cases for the reason that no earnings or surplus was shown to have been available out of which the unreported dividends, charged by the indictment and the bill of particulars, could have been paid (R. 1219-1220). These motions were denied as to each petitioner.

With respect to the Second Question urged herein: In its charge to the jury, the trial court included the following language:

> The law presumes that every man intends the legitimate consequences of his own acts, and a man is charged with knowledge of that which naturally

and normally from all the evidence flows or results from his acts normally done or performed. (R. 1244)

Passing now to the Third Question: At the conclusion of the trial court's charge, petitioners' counsel attempted to state his objections to the charge in the manner prescribed in Rule 30, Federal Rules of Criminal Procedure, and the following took place:

MR. CUNNINGHAM:
(Trial counsel for petitioners)

If the Court please, I'd like to be heard on certain matters.

THE COURT:

Any more instructions?

MR. CUNNINGHAM:

Instruction No. 8, I think. I don't think you gave that.

[The Court gives additional instructions]

MR. CUNNINGHAM:

I'd like to take exceptions to particular items.

THE COURT:

You may have exception to all instructions that the Court gave.

MR. CUNNINGHAM:

You don't want me to particularize?

THE COURT:

I don't think so. The instructions I gave you have the right to take exception to those, and the ones I didn't give—I think I gave practically all of them.

MR. CUNNINGHAM:

That is correct, Your Honor.

THE COURT:

The ones the Court gave you have the right to take exception to.

MR. CUNNINGHAM:

I want to take exception to the one on intent that you gave.

THE COURT:

All right. You may retire and appoint one of your number as Foreman. The alternates will be excused when the jury retires. Any exhibits the jury want, they may have. How about copies of these indictments? Mr. District Attorney, do you have copies of them?
(R. 1247-1248)

REASONS FOR GRANTING THE WRIT AS TO QUESTION I.

Summary of Reasons

1. **The government, by indictment and bill of particulars, charged the petitioners with having wilfully attempted to evade their income taxes by failing to report "dividends".**

2. **"Dividends", reportable as income, are defined by Statute.**

   (a) **Distributions to a stockholder, out of other than earnings or profits, are not taxable as "dividends".**

   (b) **To determine availability of taxable "dividends" all federal tax liabilities must first be deducted from net profits.**

3. **The Government's evidence failed to show that the Selray Corporation had earnings and profits available for distribution as dividends.**

4. **Petitioners were denied the right to show the Corporation had no earnings or profits out of which to pay "dividends".**

5. **The Court of Appeals in failing to reverse on this ground is in conflict with the applicable decisions of this Court, and has decided a novel and important question of Federal Law in admitted conflict with the Tax Court of the United States.**

Petitioners Bernstein, Scherer, Hammerman, and Hodes were each charged, by separate three-count indictments, with having evaded his individual income taxes for the calendar years 1947, 1948, and 1949. The bills of particulars filed as to each of the above indictments (R. 12, 67, 124, 141) stated, in effect, that each of the above-named petitioners were charged with receiving one item of income which had not been reported, *viz.*, "dividends" from the Selray Corporation in the amount of $15,086.67 in 1947, $8,440.45 in 1948, and $4,346.21 in 1949.

Now, basic to a valid conviction of *any* crime is proof of the corpus delicti. In the case of the felony proscribed by section 145(b) of the Internal Revenue Code of 1939, proof of an understatement of net income is essential—without such understatement there can be no offense. *Smith* v. *United States*, 348 U.S. 147, 154 (1945); *United States* v. *Schenck*, 126 F.2d 702 (C.A. 2, 1946). As in other criminal cases, the prosecution has the burden of proof as to every element of the offense. *Holland* v. *United States*, 348 U.S. 121, 138. Thus, in addition to a wilful intent to defraud, the Government must also prove that the accused owed more income taxes than he paid. *United States* v. *Augustine*, 189 F. 2d 587, 589 (C.A. 3, 1951).

Section 22(a) of the 1939 Code defined "gross income" as including income from "dividends", but adds in Setcion 22(e) that "distributions by corporations shall be taxable to the shareholders as provided in Section 115". Thus, Congress saw fit to qualify the all-encompassing nature of Section 22(a). The Courts have repeatedly recognized this qualification. In other words, Section 115 defines the taxability of "distributions by corporation", *Helvering* v. *Griffiths*, 318 U.S. 371, 394, 37 L. Ed. 843

(1934). A corporate distribution is includable in gross income of the individuals receiving such distribution, under Section 22(a), *only* if it is income under Section 115. See *Commissioner* v. *Goldwyn*, 175 F. 2d 641, 643 (C.A. 9, 1949) and *Jackson* v. *Commissioner*, 172 F. 2d 605, 606 (C.A. 7, 1949).

For the purposes of this question, subsections (a), (b), and (d),of Section 115 of the 1939 Code are all that are required to be considered. Subsection (a) defines a dividend as "any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year." Subsection (b) states that "every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits." Subsection (d) provides that if a distribution "is not a dividend," then the amount of the distribution "shall be applied against and reduce the adjusted basis of the stock"; and if the amount of the distribution exceeds that basis, the excess is "taxable in the same manner as a gain from the sale or exchange of property".[1]

From the foregoing, it is quite apparent that under Section 115 I.R.C. 1939, a distribution from a corporation to a stockholder is taxable as ordinary income *only* if those funds distributed are from the corporation's earnings or profits. It is for this reason that the term "earnings or profits" has "long been in the revenue acts". *Commissioner* v. *Wheeler*, 324 U. S. 542, 545, 89 L. Ed. 1166 (1945).

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1 As section 115(d) indicates, if there are no earnings or profits, a distribution is at most a capital gain after the stockholder recovers the basis of his shares. See, e.g., *Shield Co.*, 2 T.C. 763 (1943). Here the Government treated the distribution as ordinary income.

If a corporation has no earned surplus, the stockholder has no income, as stated by Justice Stone in *Palmer* v. *Commissioner*, 302 U. S. 63, 69 (1937):

> * * * but the bare fact that a transaction * * * has resulted in a distribution of some of the corporate assets to stockholders, gives rise to no inference that the distribution is a *dividend* within the meaning of Section 115.

Therefore, in the case at bar, in which the Government placed upon itself the burden to prove "dividends", as shown by the bills of particulars, it must prove beyond reasonable doubt that the corporation had earnings and profits out of which it could pay such "dividends". Otherwise, the Government fails to establish that a distribution obtained from the corporation is taxable as dividends and ordinary income.

The earnings and profits which are available for distribution as "dividends" are considerably different from the "net earnings" of a corporation. In computing earnings or profits available for distribution as "dividends", for any year, allowance must first be made for Federal and state income taxes, excess profit taxes (if any), and certain other corporate liabilities which are not deductible in computing what is ordinarily termed as "net income". In the case of an accrual basis corporation (as was the Selray Corporation) all Federal income taxes must be deducted for the purpose of determining earnings and profits, and such taxes are deemed to accrue at the end of the year in which all events have occurred which fix the amounts of such taxes and determine the taxpayer's liability there-

for. *United States* v. *Anderson*, 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 51 S. Ct. 144, 75 L. Ed. 397; *Rose* v. *Dobbs*, 36 F. 2d 464 (C. A. 5, 1929); *Stern Bros. & Co.*, 16 T. C. 295.

In the case at bar, the petitioners' theory of defense was based upon the above well-established concepts. If the Selray Corporation actually had tax liabilities in excess of the amounts reported in its returns, such excess liabilities would have to be deducted from the net earnings of the corporation before the amount available for distribution as dividends is determinable; and if the petitioners, or either of them, or any of them (assuming the Government's evidence to be true) had received any distribution in excess of the new and lesser amount found to be available for distribution, then any such distribution actually made would, in so far as such distribution exceeded the available amount, (after recovery of the basis of the shares) be at most a return of capital, taxable at capital gain rates.

The petitioners sought by Witness Kantzler and by the exhibit prepared by him (Appendix, page 26 et seq.) to show that, after accruing all of the tax liabilities that the representatives of the Internal Revenue Service had indicated would be assessed against the Selray Corporation, there would be a net loss for each of the three fiscal years, and no dividends could possibly have been paid. Hence, even if the petitioners had received distributions in the amounts claimed by the respondent, such distributions were not taxable as ordinary income. In other words, whatever the petitioners might be guilty of, they were not guilty of evasion of individual income taxes, because in many

cases no tax was due. (See, e. g., Count Three of the indictment of Petitioner Bernstein (R. 3).

When this question was first raised in the trial court it was attended by confusion. The trial court was of the opinion that no earned surplus need be shown (R. 853), since "dividends" could be paid "legally or illegally".[1] Accordingly, the trial court refused to admit the Government Agent's computation of earned surplus on the ground (among others) that no proper foundation had been laid (R. 850-857). Based further upon the trial court's theory that earned surplus need not be shown, petitioners counsel was not allowed to cross-examine this witness as to his method of computing earned surplus (R. 898-900, 904, 918).

Notwithstanding the trial court's theory, the Government Agent did make the bare statement that he had considered earnings and profits in charging the petitioners with receipt of "dividends". Petitioners tried to refute the Government witness' statement that he had considered earnings and profits, but the trial court stood upon his original theory and refused this proffered evidence on the grounds of "materiality". (See Statement of Facts, Page 9).

The Court of Appeals excused without comment this error of the trial court on the grounds that petitioners "lay entirely too much stress upon the technical requirements

[1] MR. CUNNINGHAM: * * * It is my theory here that we cannot have a corpus delicti if there is no earned surplus from which these dividends could accrue.
THE COURT: No. I cannot go along with you on that at all. You may argue that at some higher Court. I am going to reserve ruling on that question until somebody shows me some authorities. It is a very nice question of law. (R. 853-854).

as to the declaration of dividends." (Appendix, Page 10a). Nevertheless, the Court of Appeals well knew that the trial court was in error since the opinion recognizes the necessity for showing earned surplus in order to charge the petitioners with the receipt of dividends (Appendix, page 11a).

The Court of Appeals justifies the trial court's refusal to allow the petitioners to show their defense by holding that it was proper to first deduct the additional taxes (Appendix, Page 7a) but *refused* to hold that penalties, both delinquent and fraud, were similarly chargable against earnings and profits before determining amounts available for distribution as dividends.

The Court of Appeals, in order to hold thus, was required squarely to oppose the careful reasoning of the Tax Court of the United States in the only other reported case precisely on the point. *Esther M. Stein*, 25 T. C. _____ (No. 109). The Court of Appeals expressly rejects the decision (Appendix, page 12a).

Obviously, either the Tax Court or the Court of Appeals is in error. The petitioners submit that the Tax Court, correctly answers this important question of Federal Law. The Court of Appeals cites no authority whatever for its position, but appears to place great importance on the fact that no formal additional assessment had been made. This portion of its opinion is in direct conflict with this Court's decision in the case of *Fawcus Machine Company* v. *United States, supra*, wherein it was held that for the purpose of determining earnings and profits of an accrual basis corporation, certain taxes must be deducted (from net earnings in a given year) even

though the law establishing the rate of taxation had not yet been enacted. It is submitted that any additional taxes and penalties assessable against the Corporation for the year in which the return is filed must likewise be deducted before determining available earnings and profits.

The *Esther M. Stein* case, *supra.*, so holds.

The petitioners respectfully submit that this question is entitled to Supreme Court review. The real issue is whether, where Congress has laid down the law respecting the taxability of income, and the courts have rendered decisions interpreting this law, the Government may devise special laws in criminal prosecutions. In prosecutions the statutes should be strictly construed. In the case at bar, loose construction has permited conviction of a crime where under the true interpretation of the law, probably no crime has been comitted. No man can be guilty of theft of his own property, nor guilty of attempted murder of a corpse. Manifestly, a man cannot be guilty of tax evasion of ordinary income if the distribution received is not taxable as ordinary income.

This question calls for an exercise of this Court's powers of supervision. Unless such supervision is considered we will continue to have diverse concepts of income for civil and criminal purposes. The decision of the Court of Appeals will inevitably imperil the rule that dividends are founded on corporate earnings and profits. The need for supervision is further evidenced by the irreconcilable conflicts of the Courts of Appeals in this whole general area.

In the case of *Currier* v. *United States*, 166 F. 2d 346

(C. A. 1, 1948) the court held that a sole stockholder appropriating funds from a corporation was chargeable with omitting income *equal only* to the earned surplus available. In the recent case of *Dix* v. *Commissioner*, 223 F. 2d 436 (C. A. 2, 1955) Cert. Den. 350 U. S. 894, the Second Circuit held that money wrongfully appropriated by the president of a closely held family corporation did not constitute income to the person appropriating following the rule in *Commissioner* v.*Wilcox*, 327 U. S. 404. On the other hand, the recent case of *Poncet Davis* v. *United States*, 226 F. 2d 331 (C. A. 6, 1955), Cert. Den. 350 U. S. 965, held that no earned surplus need be shown in order to charge a sole stockholder with ordinary income on moneys received from a corporation. In the case at bar the Court of Appeals rejected the reasoning of the *Poncet Davis* case, but refused to follow the *Esther M. Stein* case, Supra, thus suspending itself in mid-air between the current decisions.

It is submited that Congressional enactments should and must have equal applicability to the Government and its citizens.

REASONS FOR GRANTING THE WRIT AS TO QUESTION II

Summary of Reasons

1. **The Court of Appeals admits that undesirable instructions, as to presumptive intent and reasonable doubt, were given. (Appendix, Page 15a and 22a).**

2. **The petitioners' counsel was denied the opportunity to object to these instructions out of the hearing of the jury.**

3. **When petitioners' counsel then tried to state his objections in the presence of the jury, he was cut off by the trial court without being allowed fully to state the basis for his objections.**

4. **In failing to reverse for these reasons, The Court of Appeals is in conflict with the Court of Appeals for the Fourth Circuit, the Court of Appeals for the District of Columbia, and inferentially at odds with this Court.**

The portions of the trial court's charge of which the petitioners complained in the Court of Appeals were not included in the requests made by the respondent, and were not made known to petitioners' counsel until such time as actually given to the jury. Thus, there was obviously no opportunity for petitioners' counsel to make his objections to the instructions as given until *after* the completion thereof. The error which petitioners urged in the court below grows out of the events transpiring at the conclusion of the trial court's charge. The record shows that the charge was concluded at 6:15 p.m., and immediately thereafter petitioners' counsel rose and, as petitioners urged in the Court of Appeals, made an obvious request for a hearing on his objections (R. 1247) although, speaking as he was *in the presence of the jury*, couched his request to avoid using the words "out of the presence of the jury". The trial court apparently did not recognize this request for what it was; he asked if there were any more instructions, and gave one request that had been omitted. Then, counsel again tried to apprise the court of his purpose:

MR. CUNNINGHAM:

I'd like to take exceptions to particular items. (R. 1247)

Instead of granting a hearing, the trial court, *still in front of the jury*, said:

You may have exception to all instructions the court gave. (R. 1248)

Then counsel attempted to particularize his objetcions in the presence of the jury. The trial court informed counsel that he did not desire him to particularize and when counsel did so attempt, the trial court ignored counsel and sent the jury out (R. 1248). An hour and one half later the jury returned for additional instructions.

The reason petitioners ask Supreme Court review of this question is the urgent necessity of resolving conflicting interpretations of the meaning of the last sentence of Rule 30, Federal Rules of Criminal Procedure:

Opportunity shall be given to make the objections out of the hearing of the jury.

From the language in which this rule is stated, it would appear that this requirement is mandatory, and not merely optional with the courts. "The word 'shall' is ordinarily 'the language of command', *Escoe* v. *Zerbst*, 295 U. S. 490, 493; 55 S. Ct. 818, 819; 79 L. Ed. 1566. And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being persuasive, the other mandatory." *Anderson* v.

Yungkow, 329 U. S. 482, 485; 67 S. Ct. 428, 430; 91 L. Ed. 436.

In the case of *Lovely* v. *United States*, 169 F. 2d 386 (C. A. 4 1948), while reversing on another ground, Judge Parker said the following regarding the mandatory requirement imposed on the courts by Rule 30:

> * * * We note that the exceptions to the charge were not made in the absence of the jury as the law contemplates. Federal Rules of Criminal Procedure, rule 30, 18 U. S. C. A. following section 687. *Ordinarily, failure to observe the requirements of this rule will be held sufficient ground for granting a new trial, unless it affirmatively appears that no prejudice resulted therefrom;* for counsel should not be required in the presence of the jury to place themselves in the attitude of apparent antagonism to the trial judge which is involved in excepting to the charge. Since we are granting a new trial upon other grounds, however, it is not necessary that we make any ruling upon the matter here. We mention it to call attention to *our view that the requirements of the rule, which was adopted after most careful consideration must* be strictly observed. (Emphasis supplied) 169 F. 2d 386, 391.

Although the Fifth Circuit has, in a recent decision, *Schaffer* v. *United States*, 221 F.2d 17 (C. A. 5 1955) cited the above language with approval, in the case at bar this same Court of Appeals held that the *Lovely* case did not apply (Appendix, Page 14a). Thus, in the face of the factual situation set out herein, the court below made an

inferential finding not only that the trial court need not honor the seeming mandate of Rule 30, F. R. Cr. P., but also that the failure was cured because "the jury was twice instructed after first retiring".

Petitioners submit that this question deserves expeditious review by this Tribunal. On the one hand is Judge Parker's statement of the Fourth Circuit's view that the requirement of the rule must be "strictly observed" and that failure to do so is ordinarily "sufficient ground for granting a new trial"; and on the other hand is the opinion of the Court of Appeals in the case at bar that "If the Court please, I'd like to be heard on certain matters." and "I'd like to take exceptions to particular items." and "You don't want me to particularize?" and "I want to take exception to the one on intent that you gave." (R. 1247, 1248) do not constitute an adequate request to the trial court to observe his duty under the rule, and that "failure to excuse the jury *sua sponte* to invite objections was not error." (Appendix, Page 14a).

Here, counsel was caught between the necessity of preserving the record, and the danger (soon realized) that the trial court would indicate to the jury that counsel took exception to *all* of the court's instructions (R. 1248).

Furthermore, the decision of the Court of Appeals that there was no error in the trial court's failure to allow petitioners' counsel fully to particularize his objections, and that any failures were cured because the jury later returned for further instructions, is in conflict with the decision of the Court of Appeals for the District of Columbia in *Butler* v. *United States*, 188 F. 2d 24 (C. A. D. C. 1951). In this last-named case, the court found reversible

error in the failure of the trial court to allow contemporaneous full objections to the manner of giving instructions, the decision being based not upon Rule 30, but upon general principles for the conduct of a trial:

> We hold that the action of the trial court, in denying appellant the opportunity fully to state the basis of his objection to the court's charge before the jury left the room, is not the sort of error the correction of which is contemplated by the rules. *On the contrary, it constitutes error affecting a defendant's substantial right to a fair trial and requires remanding the case for a new trial.* (Emphasis supplied) 188 F. 2d 24, 27.

Petitioners submit that the answer to this question involves a basic and compellingly important concept: to what extent may a procedural rule stated in the language of command be disregarded by the trial court? The finding of the Court of Appeals that no request was made for the hearing provided for by the rule seems, to petitioners' counsel, in the light of the cited portions of the record, palpably erroneous. Indeed, had counsel added something like "I don't want the jury to hear this", it would have brought about the very evil that the rule was designed to prevent! But assuming *arguendo* that the request was not made with sufficient clarity, the question still calls urgently for answer by the Court. The Circuits appear to be in irreconcilable conflict as to the mandatory observance of this rule. The case of *Lovely* v. *United States*, *Supra.*, holds that error results where the exceptions "were not made in the absence of this jury as the law contemplates", and makes no mention of the necessity of a request in any given language. On the other hand, the opin-

ion of the Court of Appeals for the Fifth Circuit in the case at bar, as well as that of the Second Circuit in the case of *United States* v. *Hall*, 200 F.2d 957 (C. A. 2 1953) holds that either no error or harmless error results from a similar situation.

In a broader sense, the decision in the case at bar is in conflict with the opinion in the case of *Escoe* v. *Zerbst*, 295 U. S. 490; 55 S. Ct. 818; 79 L. Ed. 1566, wherein this court speaking through Mr. Justice Cardozo set forth the principle that a statute designed to protect the rights of an accused may not be disregarded where such statute is in mandatory language. It is submitted that the language of rules promulgated by this court should not be given a lesser value. The Court of Appeals unquestionably admits that certain undesirable instructions were given. (Appendix, Pages 15a, 21a, and 22a). Had the rule been observed, these improper portions of the charge probably would have been withdrawn, and there would not be the perpetual riddle as to whether the proper instructions corrected the improper. Under these circumstances, how can it be said that the petitioners were not prejudiced by the failure of the trial court to afford them the hearing made mandatory by the rules?

The answer to this question is of great importance in the administration of criminal justice in the Federal Courts. Every single criminal jury case hereafter to be tried in the District Courts of the United States must, of necessity, be governed by the rule in question. The Circuits are in conflict as to the real need for observing this rule, and whether or not non-observance is harmless to the accused. From the point of view of legal equaminity, the opinion of the Court of Appeals is in conflict with the deci-

sions of this Court regarding the duty of courts to observe mandatory rules, e. g. *Escoe* v. *Zerbst, Supra,* and *Anderson* v. *Yungkow, Supra.* Failure to observe this rule may well be a denial of procedural due process guaranteed by Amendment V of the Constitution. Petitioners respectfully submit that the final definitive word should be spoken by this Court.

REASONS FOR GRANTING THE WRIT AS TO QUESTION III

Summary of Reasons

1. **Petitioners were charged with wilfully attempting to evade income taxes.**

2. **Specific intent is an element of the offense charged.**

3. **The trial court instructed that intent might be presumed from petitioners' acts.**

4. **The Court of Appeals held**

   (a) **That the instruction was not reversible error, although undesirable.**

   (b) **That the instruction was corrected by other charges given.**

5. **In so deciding, the Court of Appeals is in conflict with applicable decisions of this Court, of other Courts of Appeals, and of its own prior decisions.**

An essential element of the felony proscribed by Section 145(b) of the 1939 Internal Code, under which petitioners were indicted, is a specific wrongful intent. This specific intent must include an evil motive or bad purpose, as opposed to merely a conclusion intent to do the act charged. *United States* v. *Murdock*, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381; *Haigler* v. *United States*, 184 F.2d 284 (C. A. 1, 1951). See *Spies* v. *United States*, 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418 (1943). This specific wrongful intent must be found by the jury or they are not authorized to convict the accused; neither can it be inferred from the mere understatement of income. *Holland* v. *United States*, 348 U. S. 121, 139; 75 S. Ct. 127; 99 L. Ed. 150, 166 (1954).

Giving instructions to the jury for the determination of criminal intent, the trial court in the case at bar charged as follows:

> Now intent may be ascertained from all the facts in evidence and the inferences that reasonable men might naturally draw from the evidence. *The law presumes that every man intends the legitimate consequences of his own acts*, and a man *is charged with knowledge* of that which naturally and normally from all the evidence flows or results from his acts normally done or performed. (Emphasis supplied) (R. 1244).

In the Court of Appeals the petitioners contended that this charge was prejudicial and reversible error, because said charge was in conflict with the presumption of innocence. It was urged that this instruction was not essentially distinguishable from the type of instruction

condemned by this Court in *Morisette* v. *United States*, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952). It was further urged that this instruction was basically the same instruction which this same Court of Appeals, following the *Morisette* case, had declared to be reversible error in trials for the offense of income tax evasion: *Wardlaw* v. *United States* 203 F. 2d 884, (C. A. 5, 1953); *Berkovitz* v. *United States*, 213 F. 2d 468 (C. A. 5, 1954); *Vloutis* v. *United States*, 219 F. 2d 782 (C. A. 5, 1955); *Dupree* v. *United States*, 218 F. 2d 781 (C. A. 5, 1955; see also *Barfield* v. *United States*, 229 F. 2d 936 (C. A. 5, 1956).

In spite of the Court of Appeals' previous consistency of decisions on this point, the case at bar represents a sudden, (and, to the petitioners) inexplicable reversal of precedent. Although the Court of Appeals admits that this instruction represents "The most serious challenge to the judgment of conviction" (Appendix, Page 14a), it attempts to distinguish the case at bar solely because of the trial court's use of one word: "legitimate". In other words, the Court of Appeals holds that

> "The law presumes that every man intends the legitimate consequences of his own acts * * *"

is distinquishable from

> "The presumption is that a person intends the natural consequences of his acts".
>
> [Found to be error in *Wardlaw* and *Berkowitz supra.*]

The Court of Appeals further held that the charge, if error, was corrected by other portions of the charge given (Appendix, 20a).

It is submitted that this decision is in such conflict with applicable decisions of this Court and with the Court of Appeals' own prior decision as to justify the exercise of this Court's power of certiorari. To allow this decision to stand throws into confusion and uncertainty a fundamental and far-reaching principle of Federal criminal law which had previously been settled by this Court's decision in *Morisette* v. *United States*, supra.

The *Morisette* case held that in the trial of a crime requiring proof of intent it was error for the trial court to charge that intent might be *presumed* from other acts. Yet, if one looks to what the Court of Appeals *does* in the case at bar, rather than what it says, the decision can have no other effect than that of denying the *Morisette* principle. It seems obvious to petitioners that the word "legitimate" was used by the trial court and understood by the jury as a synonym for "natural and probable", in accordance with common and accepted usage.[3]

No Court of Appeals could say with certainty that the jurors did not understand and interpret it that way. As Justice Jackson said in the *Morisette* case, "juries are not bound by what seems inescapable logic to judges" (342

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[3] In Webster's New International Dictionary of the English Language, Second Edition, 1953, page 1314, one of the meanings given to the word *legitimate* is the following: "5. Reasonable; to be expected; as a legitimate result." In Funk & Wagnalls New Practical Standard Dictionary, Volume I: "(4) Following in regular sequence; logically deduced."
In the case of *Reese v. Bates*, 94 Va. 321; 26 S.E. 865, 870, the equivalence of this usage is interpreted by a Court: "The objection is directed to he use of the word 'naturally'. We think it is but the equivalent of 'legitimately' 'normally', or, in other words, embraces such damages as are the natural—that is to say, the legitimate, normal result consequent upon the breach of warranty."
In the case of Re: *Little's Estate*, 46 Cal. App. 776; 189 Pac. 818: "By 'legitimate inferences' are meant those inferences that necessarily follow from certain evidence — legal inferences, that are reasonable and legally to be drawn from the evidence."
See also *United States v. Schenck*, 126 Fed. 2d, 702.

U. S. 276). With all respect to the Court of Appeals petitioners submit that words retain their usual meaning to lay-minded jurors regardless of what the Court of Appeals says the word meant.[4]

The Court of Appeals in holding that other instructions given cured any prejudicial effect this charge of presumptive intent may have had, is squarely at odds with the holding of the Court of Appeals of the Third Circuit in the income tax case of *Nicola* v. *United States*, 72 F. 2d 780, 787 (C. A. 3, 1934), wherein the Court said:

> Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error.

as well as the Court of Appeals of the Tenth Circuit in *Frank* v. *United States*, 220 F. 2d 559, 565 (C. A. 10, 1955), and the Court of Appeals for the District of Columbia in *McFarland* v. *United States*, 174 F. 2d 538, 539 (C. A. D. C., 1949). It is equally at odds with *Bollenbach* v. *United States*, 326 U. S. 607, 612; 66 S. Ct. 402; 90 L. Ed. 350, 354.

The petitioners assert that it is even less likely that the erroneous instruction was cured in the case at bar in view of the fact that the previous correct instructions on intent were labeled by the trial court as "defendants' instructions" (R. 1234, 1235, 1236, 1243).

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[4] " 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, it means just what I choose it to mean — neither more or less.'

" 'The question is,' said Alice, 'whether you can make words mean so many different things.' "

—Carroll, Lewis, *Through the Looking Glass and What Alice Found There*, Chapter 6, page 112, Heritage Press, New York.

In spite of this Court's previous pronouncements, the law at the present time does not appear to be clear to the various Circuits—as to what extent a charge of presumptive intent is permissible in the trial of persons accused of income tax evasion. Unless this question is setled there will continue to be conflicts between the Circuits, and within the Circuits, e. g., the case at bar and the previous decisions of the Fifth Circuit; the apparent conflict in the Ninth Circuit between the cases of *Bloch* v. *United States*, 221 F. 2d 786 (C. A. 9, 1955), affirmed on rehearing 223 F. 2d 297, and the case of *Legatos* v. *United States*, 222 F. 2d 678.

Apparently however, this principle presented no conflict to the trial court. He would not even hear the objections petitioners' counsel tried to make to this charge. (See Question II, Supra.)

CONCLUSION

For all of the three above and foregoing reasons, it is respectfully submited that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August, 1956

(Appendices "A" and "B" Follow)

PROOF OF SERVICE

The undersigned, of counsel for the petitioners in the within Petition for Certiorari, hereby certify that four copies of the above and foregoing Petition for Writ of Certiorari has been served upon the Honorable J. Lee Rankin, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and upon Honorable James L. Guilmartin, United States Attorney, Post Office Building, Miami, Florida, this _____ day of September, 1956.

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